U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 211 50908 Office: VERMONT SERVICE CENTER Date: AUG [illegible] 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

A Form G-28, Entry of Appearance, was filed in this matter. On that form, the petitioner's ostensible representative does not indicate that he is an attorney but states "parties to labor certification requested we file I-140 petition to represent them." That ostensible representative's name, however, does not appear on CIS's list of accredited representatives. As such, the file contains no evidence that the petitioner's ostensible representative is qualified and authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits a statement.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 14, 2001. The proffered wage as stated on the Form ETA 750 is $18.89 per hour for 36 hours per week, which equals $35,362.08 per year.

With the petition, the petitioner submitted its 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of $14,381.53 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current assets exceeded its current liabilities.

In addition, the petitioner submitted its 2000 Form 1120 U.S. Corporation Income Tax Return. Because the priority date is February 14, 2001, information pertinent to the petitioner's finances during 2000 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. This office notes, however, that the petitioner declared a loss of $33,025.16 during that year and, again, ended the year with negative net current assets.

Further, the petitioner submitted copies of the beneficiary's 1996, 1997, 1999 and 2001 Form W-2 Wage and Tax Statements. Those W-2 forms show that the petitioner paid the beneficiary $6,825, $13,000, $13,000, and $14,040 during those years, respectively. With those W-2 forms, the petitioner submitted partial copies of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 1996, 1997, 1998, 1999, and 2001. Those returns confirm the amounts indicated by the W-2 forms. The 1998 return indicates that the beneficiary earned $13,000 during that year, but does not indicate the source of that income. Finally, the petitioner submitted page one of a 2000 Form 459-CG-S showing corrections made to the beneficiary's tax return during that year.

As was noted above, the priority date is February 14, 2001. Amounts paid to the beneficiary during previous years is not, therefore, directly relevant to any fact at issue. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on December 9, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically noted that the amount paid to the beneficiary during 2001 was less than the amount of the proffered wage.

In response, the petitioner submitted a copy of the 2002 W-2 form showing that the petitioner paid the beneficiary $14,040 during that year and a copy of the beneficiary's 2002 Form 1040 tax return confirming that amount. The petitioner also submitted additional copies of its 2000 and 2001 tax returns. Further still, the petitioner submitted a letter, dated March 4, 2003, from its ostensible representative. That letter repeatedly states that the petitioner has the ability to pay the proffered wage, notes that the petitioner's payroll exceeds $130,000 annually and that it grosses in excess of $12,000 weekly. That letter further states that the petitioner is "certainly a continuing, financially viable business."

The petitioner also submitted two pages from Kurzban's *Immigration Law Source Book* with some portions highlighted. The petitioner did not state how those portions relate to the instant case.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 22, 2003, denied the petition.

On appeal, the petitioner submits another letter from its ostensible representative, this one dated May 23, 2003. This letter cites the petitioner's gross receipts and salary expense as evidence of its ability to pay the proffered wage.

That letter asks, "How can anybody reasonably believe that this company is incapable of meeting its obligations to employees?" and states "It is absurd to believe that the company at present, is not and in the

future, cannot financially be capable of paying the [proffered wage]." The letter further asks, "Does your office really believe that this business cannot and will not make up any new salary difference for this employee who has been with them for eight years . . . ?" Finally, the letter states, "It is not accounting that seems to be the issue, but your doubt of the credibility of the business that tells you I can and I will pay the wage." The petitioner's questions and statements, through its "agent," fail to consider and meet its burden of proof.

The petitioner is obliged to demonstrate its ability to pay the proffered wage. Questions and assertions neither sustain nor obviate that burden. Further, the petitioner's reliance on its gross receipts and its wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income, or taxable income before net operating loss deduction and special deductions.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed and paid the beneficiary during 2001, but paid him an amount less that the proffered wage. The petitioner must establish the ability to pay the balance of the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

If the petitioner's net income during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The proffered wage is $35,362.08 per year. The petitioner established that it paid the beneficiary $14,040 during 2001. The petitioner must demonstrate the ability to pay the $21,322 balance of the proffered wage.

During that year, the petitioner declared a loss as its taxable income before net operating loss deduction and special deductions. The petitioner was unable, therefore, to contribute any portion of the proffered wage out of its profits. The petitioner ended the year with negative net current assets. The petitioner was unable, therefore, to pay the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.